

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion into Competition for
Local Exchange Service.

Rulemaking 95-04-043
(Filed April 26, 1995)

Order Instituting Investigation on the
Commission's Own Motion into Competition for
Local Exchange Service.

Investigation 95-04-044
(Filed April 26, 1995)
**(FCC Triennial Review
Nine-Month Phase)**

**ADMINISTRATIVE LAW JUDGE'S RULING ON SCOPE AND SCHEDULE
FOR LOOP AND TRANSPORT ISSUES**

This ruling sets a further schedule for the phase of this proceeding relating to unbundled loop and transport issues pursuant to the Federal Communications Commission (FCC) Triennial Review Order (TRO). The FCC TRO found that competitive carriers (CLECs) are impaired at most customer locations on a nationwide basis without access to dark fiber,¹ are impaired on a customer-location-specific basis without access to unbundled DS-3 loops,² and are generally impaired without access to unbundled DS-1 loops.³ The FCC also

¹ *FCC Order*, ¶ 311.

² *FCC Order.*, ¶320.

³ *FCC Order.*, ¶ 325.

found that carriers are impaired without access to unbundled dark fiber, DS3, and DS1 transport facilities.⁴

Pursuant to the Administrative Law Judge's (ALJ) Ruling issued October 8, 2003, any party seeking to overcome the finding of impairment was to resent *prima facie* evidence showing non-impairment based on analysis of the FCC designated triggers or, failing that, based on the potential deployment test on a customer-by-customer (for loops) or route-by-route (for transport) basis. In accordance with the schedule set in the ruling, SBC Communications, Inc. (SBC) and Verizon each served testimony on loops and transport issues on November 20, 2003. A collaborative workshop was held on December 4, 2003, for the purpose of facilitating consensus on loops and transport issues.

A workshop report was issued by the Commission's Telecommunications Division on December 11, 2003, setting forth the results of the workshop, including the current status of parties' discovery and case preparation. Unfortunately, no substantive areas of consensus were reached during the workshop.

Both incumbent local exchange carriers (ILECs) indicated that their testimony mailed on November 20, 2003 did not represent their complete showing on loop and transport issues because the underlying data needed to conduct a complete trigger analysis and potential deployment case had not yet been received from the CLECs. The ILECs seek to supplement their testimony to incorporate the results of analysis of subsequent data yet to be received from CLECs relating to loops and transport.

⁴ *FCC Order*, ¶ 359.

Parties representing CLECs generally either oppose the ILECs' requests to supplement their testimony or, at least, favor limiting any supplementation to support for the loop locations and transport routes for which the testimony has already asserted claims of no impairment. Thus, this ruling addresses procedural issues relating to delinquent or nonresponsive discovery and the resulting effect on the schedule on loop and transport issues.

Revisions to the Adopted Schedule

The ILECs have interpreted the October 8th ruling as allowing for them each to submit further supplemental testimony at the same time reply testimony is due. The adopted schedule previously set for loop and transport issues, however, did not contemplate an additional round of testimony from the ILECs. As stated in the October 8th ALJ ruling, any disputes that remain after the collaborative workshop were to be addressed in reply testimony due December 30, 2003. Reply testimony was limited to addressing loop or transport routes under the trigger(s) or potential deployment test for which a *prima facie* case had been presented. If the ILECs were allowed to supplement their testimony with new loop locations or transport routes at the same time that reply testimony was served, it would be impossible for the reply testimony to address claims concerning the new loop locations and transport routes.

The adopted schedule merely permitted reply testimony due December 30th in response to the ILECs' November 20th showing, to the extent consensus could not be reached in the December 4th workshop. Nonetheless, in view of the delays in receipt of discovery as highlighted at the December 4th workshop regarding loop and transport issues, the schedule shall be modified to permit the ILECs to present limited supplemental testimony on loop and transport issues. The supplemental testimony shall be limited to incorporating

additional evidence to support the loop locations and transport routes identified in the November 20, 2003 testimony for which it is claimed that one or both triggers are met. As discussed below, data received subsequent to the November 20, 2003 testimony, including that from carriers identified as “highest priority” by the ILECs, may be used to prepare the supplemental testimony. The scope of the supplemental testimony shall not be expanded to include any addition of new loop locations and/or transport routes beyond those identified in the November 20th testimony for which it is claimed that one or both triggers are met.

The ILECs also seek the option to present supplemental testimony on potential deployment relating to loops and transport. The scope of supplemental testimony shall not include a potential deployment case for any additional loop locations or transport routes beyond those presented in the November 20 testimony, but shall be allowed only for those loop locations or transport routes for which claims were made that one or both triggers are met in the November 20 testimony. Such deployment testimony may be useful, for example, as alternative support for a finding of no impairment in the event that subsequent discovery indicates that the triggers are not met for a particular loop location or transport route that was identified in the November 20th testimony.

With respect to discovery materials that a party believes justifies additions to the addition of more loop locations and/or transport routes for which triggers are met or potential deployment applies beyond those identified in the November 20, 2003 testimony, such additional loop locations and/or transport routes shall be deferred to a subsequent review process after the conclusion of this nine-month proceeding.

This limitation in the scope of supplemental testimony is warranted in keeping with the directives set forth in the FCC TRO and prior ALJ rulings in this nine-month proceeding. The FCC requires state commissions to conduct a granular analysis of high capacity loop and transport impairment only for specific customer locations or routes for which sufficient relevant evidence has been presented.⁵ The November 20, 2003 testimony was the designated forum for the ILECs to present relevant evidence on this issue.

The October 8th ALJ ruling informed parties that “[o]nly where a *prima facie* case is presented for a particular customer-by-customer location by loop type or transport route for any applicable trigger or potential deployment test will further proceedings be necessary.” Thus, the ILECs were placed on notice that those loop locations and transport routes identified in their November 20, 2003 testimony would serve to limit the scope of further proceedings. Neither of the ILECs filed a motion to compel discovery nor requested an extension for submission of testimony in view of a perceived lack of supporting information to identify the loop locations and transport routes meeting the triggers. Thus, it is appropriate to limit further supplemental testimony to supporting the loop locations and transport routes identified by the ILECs in their November 20, 2003 testimony.

December 30, 2003 shall be the due date for supplemental testimony to be presented by the ILECs. The date for reply testimony on loops and transport issues, previously scheduled for December 30, 2003, shall be rescheduled to January 21, 2004. The previous date of January 12, 2004 reserved for the start of

⁵ TRO at ¶ 417, and note 1289.

evidentiary hearings on loop and transport issues shall be postponed. The need to schedule further collaborative workshops and/or evidentiary hearings on loops and transport issues shall be assessed upon receipt of the January 21, 2004 testimony. In the event that such evidentiary hearings prove necessary, they shall be scheduled (in coordination with any batch cut issues) to follow immediately upon the conclusion of hearings on switching issues, currently reserved for the period January 26 through February 6, 2004.

Discovery Issues

A major theme during the workshop was the critical link between timely receipt of discovery and constraints on production of evidentiary testimony. Parties require timely receipt of data responses in order incorporate pertinent evidentiary materials into their testimony under the revised schedule adopted above. Accordingly, concerted efforts must be made to expedite the production and delivery of outstanding discovery.

The deadline for responses to the census data called for in the October 22, 2003 letter sent by Commissioner Kennedy has passed. Responses were due by November 12, 2003. Carriers that have not responded are in violation of Commissioner Kennedy's directive, and must produce the relevant data without delay. Public Utilities Code Section 314 provides authorization for the Commission to collect this information. In the event that a carrier fails to respond, the Commission has the authority to use subpoena power to compel production, and to impose appropriate sanctions in accordance with Public Utilities Code Section 311(a).

Likewise, carriers shall respond promptly to discovery propounded by parties concerning loop and transport data. It is the responsibility of parties to actively pursue timely responses to any outstanding data requests that they

believe are necessary for completion of their testimony. The same rights, responsibilities, and remedies applicable to individual parties' discovery efforts likewise apply to data responses that were required by the Commission pursuant to the letter dated October 22, 2003 from Commissioner Kennedy. Thus, to the extent any party is impeded in completing its showing due to a delinquency or deficiency in responses from one or more carriers for data that has been called for through the Commission-sponsored discovery, that party is responsible for identifying such deficiencies and delinquencies and pursuing appropriate remedies on the same basis as for its own self-initiated discovery. Such measures include pursuing follow-up questions to clarify or complete responses, having meet-and-confer sessions to seek resolution with the carrier, and the filing of timely motions to compel, if necessary, under the Commission's prescribed law and motion process. A party's inaction or delay in pursuing delinquent, nonresponsive, or incomplete discovery, including delay or failure to file motions to compel, etc., will be weighed in considering the merits of the party's claims based on an alleged lack of data or delayed responses to discovery.

The workshop participants agreed to have a meet and confer session to address definitional issues and to report back to the Commission and Staff on progress made. The meet and confer was meant to cover both the Commission's discovery as well as any parties' discovery.

As a follow-up to the workshop, SBC and Verizon identified specific carriers and discovery questions of the highest priority in completing its loops and transport analysis. Since the workshop concluded, SBC had received responses from all of the carriers identified in the "highest priority" category except for ICG Telecom Group, Inc. (ICG). By this ruling, ICG is directed to respond without delay to the Commission's directive to produce the outstanding

data responses. Likewise, those carriers identified by Verizon as high priority are directed to comply promptly.

Notwithstanding the need for prompt and complete responses, SBC gives the highest priority to receiving the following information:

- 1) For Loops: Identify customer address and capacity level of each carrier's high-capacity loops, along with information as to whether the loop is used to serve the carrier's own end users or those of another carrier. On the Commission spreadsheet, this information appears at columns C-D (address and city), G-I and M-O (capacity level and # of circuits).
- 2) For Transport: Identify central offices at which the carrier has deployed fiber optic transport facilities, which of those facilities are connected to other central offices, and the capacity level of those facilities, along with information as to whether those facilities are used to serve the carrier's own end users or those of another carrier. On the Commission spreadsheet, this information appears at columns A, K-Q, R, and Y-Z.

Some carriers have responded by identifying individual central offices and stating that their transport facilities for each central office are connected to a particular "ring." To the extent the same applies to carriers that have not yet responded, it may facilitate their response to provide such an explanation. SBC does not object to such an approach.

In highlighting these priorities, there is no intent to minimize the requirement for all carriers to respond to the Commission's requests, or to imply that other information requested by the Commission or by the parties is not relevant. Rather, the carriers identified as a priority are believed by SBC to have information on the largest share of buildings and routes. Likewise, the data

fields highlighted as a priority are considered baseline information by SBC to help confirm routes and locations along which applicable triggers (wholesale and/or self-provisioning) and capacity levels (DS-1, DS-3, and/or dark fiber) may apply.

IT IS RULED that:

1. SBC Communications, Inc. and Verizon are hereby permitted to present supplemental testimony on loops and transport issues on a limited basis, to be due on December 30, 2003. The supplemental testimony shall be limited to incorporating additional evidence to support the loop locations and transport routes identified in their November 20, 2003 testimony for which it is claimed that one or both triggers are met, but shall not be expanded to include any new loops and/or transport routes. Potential deployment testimony, if any, shall be limited to those loop locations or transport routes for which claims were made that one or both triggers are met in the November 20 testimony.
2. The date for reply testimony on loops and transport issues, previously scheduled for December 30, 2003, shall be rescheduled to January 21, 2004.
3. The previously reserved date of January 12, 2003 for the start of evidentiary hearings on loop and transport issues shall be postponed. Further evidentiary hearings on loops and transport issues, if needed, shall be scheduled, together with batch hot cut issues, to begin immediately upon the conclusion of hearings on switching issues.
4. Those carriers that are delinquent or nonresponsive with respect to responding to the Commission's directive for census data and to the high priority issues relating to loops and transport as identified by the ILECs are directed to respond without delay.

5. It is the responsibility of parties to actively pursue any outstanding data responses necessary for completion of their testimony. The same rights, responsibilities, and remedies applicable to individual parties' discovery efforts likewise applies to data responses that were required by the Commission pursuant to the letter dated October 22, 2003 from Commissioner Kennedy.

6. Carriers that have not responded are in violation of Commissioner Kennedy's directive, and must produce the relevant data without delay in accordance with the requirements of Public Utilities Code Section 314.

7. A party's inaction or delay in pursuing delinquent discovery, including delay or failure to file motions to compel, etc., will be weighed in considering the merits of the party's claims based on an alleged lack of data or delayed responses to discovery.

Dated December 15, 2003, 2003, at San Francisco, California.

/s/ THOMAS R. PULSIFER

Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling on Scope and Schedule for Loop and Transport Issues on all parties of record in this proceeding or their attorneys of record.

Dated December 15, 2003, at San Francisco, California.

/s/ HELEN FRIEDMAN
Helen Friedman

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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